THE RIGHT TO WORK FOR THE STATE.

If James Smith declines to employ John Jones, Jones cannot complain that he is thereby denied the equal protection of the laws, for his exclusion from employment by Smith is not the result of any intervention of the law. The law as to Jones is the same as the law as to anyone else. If, however, a statute forbids James Smith to employ John Jones, then Jones is subject to a discrimination imposed by law. He is not accorded by the law treatment identical with that accorded to others. Unless there is some justifiable reason for this legal discrimination against Jones, he is denied the equal protection of the laws.

It has recently been decided by the Supreme Court in *Truax* v. *Raich*,[1] that aliens are denied the equal protection of the laws by a state statute which provides that every employer of more than five workers at any one time "shall employ not less than eighty (80) per cent qualified electors or native born citizens of the United States or some subdivision thereof." Mr. Justice Hughes, in the opinion of the court,[2] stated that "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

If the Constitution prohibits statutes compelling individual employers to discriminate against aliens, does it prohibit statutes compelling the state's administrative officers to make such discrimination? Under the decision of *Truax* v. *Raich* individuals must be free to select their employees, and to lay down such rules of selection, as they choose. Is the state with regard to its own employees in the same position as any individual employer?

Shortly after rendering the decision of *Truax* v. *Raich*, the Supreme Court in the cases of *Heim* v. *McCall*[3] and *Crane* v. *New York*[4] sustained a statute of New York which provided that

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[1] 36 Sup. Ct. Rep. 7 (November 1, 1915).

[2] At p. 10.

[3] 36 Sup. Ct. Rep. 78 (November 29, 1915). This was a bill in equity to restrain the Public Service Commission for the First District of the State of New York from declaring certain contracts void and forfeited for violation of the provision against the employment of aliens.

[4] 36 Sup. Ct. Rep. 85 (November 29, 1915). This was a writ of error to review a judgment of conviction for a violation of the anti-alien labor law.

in the construction "of public works by a state or municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed."[5] The purpose of this paper is to consider the correctness of this decision.

With the right of the municipality to object to state dictation in the selection of employees we are not here concerned. Nor are we concerned here with the rights of contractors for the municipality to object to state dictation with respect to the manner in which they shall perform contracts obtained from the municipality.[6] We confine our attention, therefore, to the sole question whether complete denial to a fixed class of individuals—such as aliens—of the opportunity to secure any employment whatsoever on public works is a denial of equal protection of the law.

I.

The Supreme Court held that this question was foreclosed by the decision in *Atkin* v. *Kansas*.[7] "In all particulars except

[5]This statute was sustained by the Supreme Court of New York County, Special Term, in Heim *v.* McCall, 88 Misc. 291 (December 8, 1914). Before the Appellate Division, Heim *v.* McCall and People *v.* Crane were argued together and the statute was declared unconstitutional, without dissent (People *v.* Crane, 165 App. Div. 449, December 31, 1914). On appeal to the Court of Appeals the decision of the Appellate Division was reversed and the statute was sustained. Collin, J., dissenting (People *v.* Crane, 214 N. Y. 154, February 25, 1915). Only two of the judges, however, (Bartlett, Ch. J., and Seabury, J.) sustained the statute on the broad ground on which it was upheld in the federal Supreme Court. Cardozo, J., with whom concurred Chase, Hogan and Miller, JJ., stated (at p. 167): "In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged class among the members of the state." See *infra*, page 112. The statute was also sustained by the Court of Appeals in Heim *v.* McCall (1915) 214 N. Y. 629, but no opinion was rendered.

[6]Both of these rights were denied by the Supreme Court in Atkin *v.* Kansas (1903), 191 U. S. 207, on grounds which appear unexceptionable. The Kansas statute did not make any discrimination between contractors for the municipality. Everyone seeking a contract from a municipality to do public work was subject to identical treatment. The terms imposed were ones which every contractor had the same legal opportunity to comply with as was accorded to any of his competitors. It is true that contractors for public work were not accorded identical treatment with contractors for private work. The law imposed terms on one class which were not imposed on the other. But contractors for public work are not a fixed class in the community. Every individual contractor may be at the same time a contractor for public work and a contractor for private work. In respect to contractors, the discrimination imposed by the statute was not based upon any fixed characteristics of the persons who might become subject to such discrimination, but rather upon the characteristics of the persons for whom the work is done.

[7](1903) 191 U. S. 207.

one," said Mr. Justice McKenna,[8] "the case was the prototype of this."

"There the hours of labor were prescribed; here the kind of laborers to be employed. The one is as much of the essence of the right regulated as the other, that is, the same elements are in both cases,—the right of the individual employer and employee to contract as they shall see fit; the relation of the state to the matter regulated; that is, the public character of the work."

The opinion then went on to quote from *Atkin* v. *Kansas* to the effect that "it belongs to the state as the guardian of its people and having control of its affairs to prescribe the *conditions* upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." Only by italicising the word "conditions" in the quotation—the word not being italicised in the *Atkin* v. *Kansas* opinion—did Mr. Justice McKenna show the applicability of the earlier decision to the one before the court. Reference was made also to *Ellis* v. *United States*.[9] On the authority of these two cases, therefore, the court maintains the power of a state to deny absolutely to aliens any opportunity whatsoever of obtaining employment on public works. To ascertain, then, the bearing of *Atkin* v. *Kansas* and *Ellis* v. *United States* upon the precise point at issue, we must turn to the statutes involved in those decisions.

The Kansas statute provided that eight hours should constitute a day's work for all laborers employed by or on behalf of the state or any county, city, township or other municipality of the state, and that the current rate of wages should be paid, and that contractors in the execution of contracts with the state, city, etc., should be subject to the provisions of the Act. The statute of Congress under consideration in *Ellis* v. *United States* limited the hours of laborers and mechanics employed by the United States or any contractor or sub-contractor upon any of the public works of the United States to eight hours per day, except in cases of extraordinary emergencies.

It is important to note that neither of these statutes interfered with the opportunity of any person to secure employment on public works. The only discrimination in respect to laborers involved in these statutes consisted in giving to laborers on public works

[8] In Heim *v.* McCall (1915) 36 Sup. Ct. Rep. 78, at p. 84.

[9] (1907) 206 U. S. 246. Inasmuch as this case involved a statute of Congress, it affords no precedent on the question of the denial of equal protection of the laws, for the Constitution does not forbid Congress to deny the equal protection of the laws.

certain advantages not by law assured to laborers on private works. This was not identical treatment of all laborers. The question whether it was a denial of equal protection to those laborers not employed on public works seems not to have been raised in the cases. Such a proposition could, however, clearly not be maintained. All laborers were left an equal opportunity under the law to secure employment on public works. There was no definite fixed class of laborers discriminated against by the law. Further, it seems clear that the benefits which the law conferred upon those who secured employment on public works did not in any way involve corresponding detriment to those failing to secure such employment. In fact, the tendency would be rather to improve the condition of laborers on private works. The opponents of such legislation have criticised it on the ground that its purpose was to accomplish indirectly the raising of all wages and the shortening of a day's work in all employments. A further justification for confining the benefits of this statute to laborers on public works lies in the fact that the government had power to confer such benefits on laborers on public works, while its power to confer such benefits on all laborers is questionable.[10] It is a general principle that a statute designed to remedy certain evils does not violate the equal-protection clause because it does not remedy all similar evils.[11] It would seem to follow from this that a statute conferring benefits on a certain class does not

[10]See Abilene National Bank *v.* Dolley (1913) 228 U. S. 1, holding that classification is not invalid because it excludes similar objects of regulation that are legally outside the authority of the regulating body. This was an instance of state regulation of state banks which did not include national banks.

[11]Carroll *v.* Greenwich Insurance Co. (1905) 199 U. S. 401. "If an evil is specially experienced in a particular branch of business, the constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities." See also Chicago Dock Co. *v.* Fraley (1913) 228 U. S. 680, 687, "The law may not be the best that can be drawn, nor accurately adapted to all of the conditions to which it was addressed. It may be that it would have been more complete if it had gone farther and recognized and provided against the danger that all uninclosed openings in a building might cause, and should not have distinguished between hoists inside of a building and those outside; but we do not see how the plaintiff in error is concerned with the omissions. It is not discriminated against. All in its situation are treated alike." In Rosenthal *v.* New York (1912) 226 U. S. 260, 271, Mr. Justice Pitney said: "The argument under this head concedes, and must concede, that the act is beneficial as far as it goes, the complaint being that it does not go far enough. But the Federal Constitution does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment."

violate the constitutional provision because it fails to confer similar benefits on all other classes, provided such other classes suffer no detriment from the operation of the statute.

There is, however, a fundamental distinction between a statute conferring benefits on laborers on public works, leaving everyone an equal opportunity to obtain such employment, and one absolutely prohibiting a fixed class of persons from obtaining such employment. In the former there is no discrimination from which any laborer suffers. In the latter, there is such discrimination. This discrimination, when imposed by the state, is a denial of equal protection of the laws, unless there is justification therefor on the ground that inherent differences in the classes differently treated furnish a reasonable basis for the classification. It is to be noted that the court in its opinion in *Heim* v. *McCall* does not seek to justify the discrimination against aliens on the ground that the character of the work was such that aliens would make less desirable laborers than would citizens. Nor is the discrimination sought to be justified on the ground that aliens by reason of their alienage have rights inferior to those of citizens. The decision is based on the broad ground that the state as employer has the same freedom to discriminate against any class in the selection of its employees as that enjoyed by any individual employer. As was pointed out in the opinion of Judge Collin, who dissented in the case when it came before the New York Court of Appeals, such a doctrine would permit any kind of discrimination; would establish that the state may declare by statute that in the administration of its public works

"only the registered electors of a designated party, or only unmarried persons, or only white persons, or Protestants or Catholics, or persons born in this state, shall be employed or appointed, or that certain designated citizens shall not be employed, or that goods or products made or grown by corporations of this state shall not be purchased."[12]

It is clear that no such discrimination as this was before the court in *Atkin* v. *Kansas*. The actual decision in that case is therefore not authority for *Heim* v. *McCall*. The rights at issue in that case were not those of a class of laborers absolutely excluded, but were rights of contractors in respect to the specifications which the state could include in its request for bids. With regard to the rights of contractors, Mr. Justice McKenna is doubt-

[12]214 N. Y., at p. 194.

less sound when he says that the kind of laborers to be employed is as much of the essence of the right regulated as are the hours of labor.[13] But it does not follow that this is true of the rights of laborers. In *Atkin* v. *Kansas* there was no prescription as to the kind of contractors to be selected. Every contractor was on an equality with all his competitors.

Nor is Mr. Justice McKenna justified in his reliance on the statement in *Atkin* v. *Kansas* that "it belongs to the state to prescribe the *conditions* upon which it will permit public work to be done on its behalf." That this does not furnish authority for the proposition that the state may exclude from the opportunity to secure employment on public work any laborer whom it chooses appears from a fuller quotation from the portion of the opinion in *Atkin* v. *Kansas* relied on.

"It cannot be deemed a part of the liberty of any contractor that *he*[14] be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State. On the contrary it belongs to the State . . . to prescribe the conditions upon which it will permit public work to be done on its behalf."

By "conditions" the court clearly had in mind restrictions on the desire of contractors to determine for themselves how they shall perform work for the state. It is an unwarranted extension of the meaning of the word "conditions" as used in *Atkin* v. *Kansas* to make it include an absolute denial of the right to contract at all.

If our reasoning thus far is sound, neither the actual decision of *Atkin* v. *Kansas* nor the quotations from the opinion presented justify the decision of *Heim* v. *McCall.*

II.

We now proceed to consider the doctrine that the state as employer has all the rights under the federal constitution enjoyed by any individual employer. This doctrine was not specifically announced in *Atkin* v. *Kansas,* but Mr. Justice McKenna seems to regard it as implicit in that decision.[15] He refers also to a sentence

[13]See quotation from his opinion in Heim *v.* McCall on page 101 of this article.

[14]Italicised in the opinion. The quotation is from 191 U. S. at pp. 222-223.

[15]"In all particulars except one, the case [Atkin *v.* Kansas] was the prototype of this. There the hours of labor were prescribed; here the kind of laborers to be employed. The one is as much of the essence of the right regulated as the other, that is, the same elements are in both

from Chief-Judge Bartlett of the New York Court of Appeals to the effect that the statute under consideration is nothing more in effect than a resolve by an employer as to the character of his employees.[16] Is it sound that the right of a state to contract as it shall see fit is the same as the right of an individual so to do?

A significant difference between the individual employer and the state at once suggests itself. The federal constitution does not require individuals to accord equal treatment to all. It does not forbid individuals to discriminate against individuals. It does, however, expressly declare that no state shall deny to any person within its jurisdiction the equal protection of the laws. Thus state action is prohibited by the federal constitution where individual action is not prohibited. This distinction between the application of the Constitution to state action and to individual action is the basis of the decision in the *Civil Rights Cases*[17] where, in reference to the same constitutional provision involved in *Heim* v. *McCall,* the court says:[18] "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."

Another reason why the effect of the Constitution on state action differs from its effect on individual action is that unequal treatment by an individual is not the result of the passage of a law.

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cases,—the right of the individual employer and employee to contract as they shall see fit; the relation of the state to the matter regulated; that is, the public character of the work." Heim *v.* McCall (1915) 36 Sup. Ct. Rep. 78, 84.

[16]214 N. Y. at p. 175. This was not the opinion of the majority of the court, which was based on the narrower ground that aliens did not stand on an equality with citizens. Judge Bartlett, however, insists that previous decisions had established "the proposition that the state in the prosecution of a public work stands in just the same position as an individual." "I can find no reason to suppose," he says, "that the Fourteenth Amendment was designed to limit or restrict the rights of the state as an employer of labor. Other employers, individual or corporate, possess the undoubted and absolute right to withhold employment from whomsoever they see fit. The Constitution could hardly have been intended to deprive the states of equality with private employers in this respect. . . . The statute is nothing more, in effect, than a resolve by an employer as to the character of his employees. An individual employer would communicate the resolve to his subordinates by written instructions or by word of mouth. The state, an incorporeal master, speaking through the legislature, communicates the resolve to its agents by enacting a statute. Either the private employer or the state can revoke the resolve at will. Entire liberty of action in these respects is essential unless the state is to be deprived of a right which has heretofore been deemed a constituent element of the relationship of master and servant, namely, the right of the master to say who his servants shall (and therefore shall not) be."

[17](1883) 109 U. S. 3.

[18]At p. 11.

Discrimination imposed by the state through legislation is imposed by law, and the Constitution forbids denial of equal protection of the law where it does not forbid denial of equal protection accomplished without intervention of the law. The state, therefore, when it attempts discrimination through legislation, lacks the freedom enjoyed by individuals, because the Constitution limits the state where it does not limit individuals, and limits legislative action where it does not limit action which is not legislative.[19]

Although the state is subject to constitutional limitations from which the individual employer is free, there remains another ground on which to base the contention that the state, like the individual, may discriminate as it chooses in the selection of its employees. This ground is that the relation of the individual laborer to the state as employer is such that he is not within the fold of the constitutional guarantee of equal protection of the laws. The state, like the individual, may decline to be an employer at all. It is therefore urged that since the state may refuse employment

[19]Certain practical distinctions between the state and an individual make questionable the wisdom of a decision based on the assumption that the two have identical rights. The individual who at any moment chooses not to employ some particular class of laborers remains always free at an instant's notice to change his mind. If we choose to consider him as legislator for himself as contractor, we note that he remains in continual session and is subject to no hampering rules of procedure or press of other business which impose difficulties in the way of repealing his edicts. The state as legislator when it sets rules for itself as contractor is in a situation quite different from that of the individual. The conception of the state as a legal person endowed with will should not blind us to the fact that this legal entity can act only through human agents. To deny to the legislative agents of the state the right to exclude any class of laborers from public employment does not curtail the power of executive agents to exercise judgment in the selection and exclusion of employees. In fact such right is curtailed by any statutory exclusion. The result of sustaining a statute excluding any class of laborers from employment on public works is to leave the executive agents of the state less free than the individual employer. On the other hand, if such a statute is declared invalid, the state is quite as free by executive selection to employ whom it chooses as is any individual. It is merely restrained from making discrimination by statute. Since the legislature is not always in session and since legislative action is always cumbrous and dilatory, the state is more nearly in the position of possessing the freedom enjoyed by an individual in the selection of its employees when it makes such selection by executive agents than when it does so by legislative agents. Though it is convenient for certain purposes to conceive of the state as a conscious entity with a will of its own, this conception should not be employed to ignore the practical differences between such an entity and an individual human being in respect to their methods of action. The state cannot possibly have freedom of action like that of an individual. The assertion that such is the case cannot make it so. Judicial decisions founded on a theory which is not in accord with the facts may increase rather than diminish the essential dissimilarity between the two.

to any given class by undertaking no work which calls for such employment it may refuse employment to that class by discriminating against it in favor of another class—that since the class has no right to claim work if all are denied work, it has no right to claim the opportunity to work under any different circumstances.

Although the opinion in *Heim* v. *McCall* does not specifically set forth this doctrine, this is undoubtedly the theory underlying the proposition that the right of the state to contract in respect to public work as it shall see fit is the same as the right of the individual employer so to do.[20] The power of discriminatory exclusion is assumed to follow from the power of excluding all. It must be conceded that there is language in the opinion of *Atkin* v. *Kansas* which, abstracted from its special reference to the statute there under consideration, might seem to lay a foundation for such proposition. Mr. Justice Harlan in that case says:[21]

If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute

[20]This is the view of Seabury, J., in his concurring opinion in the Court of Appeals, as appears from the following excerpts: "Public works are public property. As such they belong wholly to the sovereign power of the state. The manner in which they shall be built is within the function of the sovereign power to prescribe. . . . Public property is in its very nature subject to social control. . . . Just as the individual may, generally speaking, do what he will with his own, so the state, may exercise a like control over public property. In the same way that *private* property is subject to *individual* control, so *public* property is subject to *governmental* control. The provisions of the State and Federal Constitutions guaranteeing liberty and property, refer to individual liberty and private property. They do not confer upon the individual, be he citizen or alien, the right to interfere with the use that the state may make of its public property or any regulation which it may prescribe as to the manner in which its public works shall be built. The constitutional safeguards which surround the liberty of the individual confer upon him no right or liberty to engage in public work. The statute under consideration does not involve governmental interference with individual liberty. The attempt of the contractors engaged in public work to deprive the state of the right to prescribe the conditions upon which the work shall be done, is the assertion of the right of individual interference with the government. The manner in which public works shall be built is a matter wholly within the sphere of social as distinguished from individual control. We cannot lose sight of the fact that there are these separate and distinct spheres of action. It may not be possible to draw with precision the line of demarcation between them, but we all nevertheless recognize that there is a line of demarcation to be drawn. As we deny to the state the right to intrude into the individual sphere of action and to prescribe what we shall believe, and except where the public welfare is involved, what we shall publish, or to supervise private morals, so the state denies to the individual the right to intrude within its social sphere of action and insists that he has a right to be employed upon its public works. The right of state control springs from the public or social character of the work." 214 N. Y. 154, at pp. 178, 179-180.

[21]191 U. S. 207, at pp. 222, 223.

in question, in its application to those undertaking work for or on behalf of a municipal corporation of the State, does not infringe the personal liberty of anyone. . . . If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public work to permit or require his employee to perform labor upon that work in excess of eight hours each day, is in derogation of the liberty both of employés and employer, it is sufficient to answer that no employé is entitled, of absolute right and as a part of his liberty, to perform labor for the State; and no contractor for public work can excuse a violation of his agreement with the State by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

That no employee is entitled *of absolute right* and as a part of his liberty to perform labor for the state may be conceded. From this it would follow that the right of all may be subjected to regulation. It would not, however, necessarily follow that all might be absolutely excluded from such employment. The absence of an *absolute* individual right to obtain employment does not support an *absolute* right on the part of the state to exclude all. But even if this proposition were denied, the power to discriminate against a particular class does not follow from the power to exclude all. Exclusion of all would not be a denial of equal protection. It would accord equal protection. The equal-protection clause was designed to put different classes on a parity, to entitle them to more than they could claim under the due-process clause. It may be no denial of liberty under the due-process clause to exclude some by excluding all, but still be a denial of equal protection to exclude some in any other way than by excluding all. Discriminatory exclusion may be obnoxious to the equal-protection clause even though non-discriminatory exclusion is not obnoxious to either clause.[22]

If, therefore, this difference of treatment between aliens and citizens would, in the absence of other elements constituting a justification for the discrimination, be held a denial of equal protection, it is not necessarily rendered lawful by the fact that the state by some other method, for example, by undertaking no such work and thereby excluding all, might lawfully have excluded

[22]It would not follow that because the United States might take the life of a person convicted of treason, it could therefore instead subject him to the kind of temporary torture which would be regarded as a cruel and unusual punishment. A person without any right to claim his life from the government is still protected by constitutional guarantees against other deprivations.

aliens from employment. That the so-called absolute control of the state over public work is not really absolute, but is a control subject to possible restrictions, is implied in the concluding paragraph of the opinion in *Atkin* v. *Kansas* in the qualification below, printed in italics.[23]

"We rest our decision on the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final *so long as it does not, by its regulations infringe the personal rights of others; and that has not been done.*"

It thus appears that though the court in *Atkin* v. *Kansas* regarded the control of the state over public work as absolute, it realized that there might nevertheless be limits to such control. The logical difficulty in such a position will persist so long as men cling to the notion of an absolute. The way of escape has been admirably indicated by Mr. Justice Holmes in *Hudson County Water Co.* v. *McCarter*.[24]

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. . . . It constantly is necessary to reconcile and adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others."

The same principle of logic was also declared by Judge Cardozo in *People* v. *Crane*,[25] in the opinion which sustained on other grounds the statute now under consideration:

"It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared *disqualified* from service unless the proscription bears some relation to the advancement of the public welfare."[26]

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[23] 191 U. S. 207, at p 224. The italics are the author's.

[24] (1908) 209 U. S. 349, at pp. 355, 357.

[25] (1915) 214 N. Y. 154, at p. 168.

[26] Citing Strauder *v.* West Virginia (1879) 100 U. S. 303, at p. 305: "It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury."

In the opinion in the same case before the Appellate Division, in which the statute was declared invalid,[27] Mr. Justice Scott was guided by similar considerations, which he stated as follows:[28]

"It is also argued that the State has the right to determine with whom it will contract. . . . This is true, however, only if the terms prescribed are not such as to violate the fundamental and paramount law to which even the State is subject."

A familiar illustration of the principle here contended for appears in the power of the state over corporations. These it may decline to create. No would-be corporation has any constitutional right to come into existence. But this initial right of the state to decline to create does not afford a foundation to sustain any absolute power on the part of the state to make any discrimination whatsoever that it chooses between corporations and individuals. The same principle obtains with regard to the power of the state over foreign corporations. In the case of *Western Union Telegraph Company* v. *Kansas*[29] the majority of the court declared that the power of the state to exclude a foreign corporation from doing intra-state business within its borders did not justify the imposition of a tax on the intra-state business of foreign corporations admitted to do such business, when the tax in question was one which involved a taking of property without due process of law and the imposition of a burden on interstate commerce.

In this case Mr. Justice Holmes dissented. The pith of his argument was expressed in the aphorism: "Even in the law the whole generally includes its parts." He thus implies that the *power of total exclusion* is a "whole," of which the *power to impose any burdens whatsoever on those admitted* is a "part." The fallacy here will appear if the proposition is put in syllogistic form.[30]

Major Premise. There is a class of corporations "A" (foreign corporations doing intra-state commerce) over which the state has the *power of absolute exclusion.*

Minor Premise. The X corporation is an "A" corporation.

Conclusion. Therefore the X corporation is one upon which the state has *power to impose any burden whatsoever.*

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[27]People *v.* Crane (1914) 165 App. Div. 449.

[28]At p. 458.

[29](1910) 216 U. S. 1.

[30]The author is indebted to Professor W. B. Pitkin of Columbia University for assistance in the discussion immediately following.

Plainly the only legitimate conclusion from these premises is that the X corporation is one over which the state has the *power of absolute exclusion.* Mr. Justice Holmes is guilty here of the fallacy of four terms. He has a different predicate in his conclusion from that in his major premise. The terms "power of absolute exclusion" and "power to impose any burden whatsoever" are in the predicate. And in the predicate there is no relation of whole and parts.[31] It is true that in the law as in reason elsewhere the whole includes its parts, where there exists the relation of whole and parts. To put the term "power of absolute exclusion" in such form that it may be subject to the relation of whole and part, of a class and its members, it must be reduced to the term, "the class of all powers of absolute exclusion." Every member of this class must be "a case of the power of absolute exclusion." Logically a thing which may be absolutely excluded is not the same as a thing which may be subjected to burdens of a different kind, even though such burdens would be regarded by all as less onerous than the burden of absolute exclusion. The "power of absolute exclusion" is a term not identical with the "power of relative exclusion" or the "power to impose any burdens whatsoever."[32]

What is true of the relation between the power of absolute exclusion and the power of relative exclusion or power to impose any burdens whatsoever, as applied to the relation between a state

[31]A similar fallacy would be found in the contention suggested in note 22, *supra,* that because the government could kill it could substitute torture for death. The right of the state to kill is not a "whole" of which a right to torture is a "part."

[32]For illustration of a similar point see Shepherd *v.* The People (1862) 25 N. Y. 406 holding that change of punishment from death to life imprisonment was *ex post facto* as applied to a crime committed before the change in the law. In the opinion, Judge Sutherland said (at pp. 415, 414): "The moral or philosophical disquisition as to whether imprisonment for life at hard labor is better or more desirable or less severe than death, has really nothing to do with the question. . . . Imprisonment for life at hard labor is an entirely different kind or manner of punishment, from punishment by death. . . . The two punishments have no elements in common. . . . So also if an act, when committed, was punishable by thirty days' imprisonment, a subsequent law changing the punishment of the act to thirty stripes or thirty dollars fine would be plainly *ex post facto.* . . . If you do not hold a law punishing an act in a different manner than it was punishable when committed to be *ex post facto,* irrespective of the question whether the new punishment is or is not more merciful or lenient, you will leave it to the discretion of the legislature and of judges to say whether the new punishment is or is not more merciful or lenient than the old."

and foreign corporations, is likewise true of the relation between the power to exclude all and the power to exclude some and not all, as applied to the relation between a state and the selection of its employees. The latter right cannot be deduced logically from the former. The fact that the right of the state to exclude some by excluding all is not denied by the due-process clause, has no bearing upon the question whether the right to exclude some but not all is denied by the equal-protection clause.

The view of the Supreme Court, therefore, that because no one has any right to work for the state, the state may make such discrimination as it pleases in selecting its employees, seems unsound in logic and opposed to the judicial opinions above cited. It is submitted, therefore, that in so far as *Heim* v. *McCall* stands for the proposition that the equal-protection-of-the-law clause sets no limits whatever to the power of the state to discriminate by statute in the selection of its employees, the decision is unsound in principle and not warranted by previous decisions.

III.

There remains for consideration the question whether the discrimination against aliens can be justified on other grounds. In the opinion of Judge Cardozo in the New York Court of Appeals, the statute excluding aliens from public employment was justified on the ground that aliens stood in a different relation to such work than do citizens, and that it was therefore a reasonable classification to put aliens in a class for special treatment. The learned judge, in an able opinion, conceded that the state could not discriminate against certain classes of *citizens* where such discrimination bore no reasonable relation to the public welfare. He placed *aliens* in a different category, however, on the ground that the state in giving employment was regulating the distribution of its resources. As the state may discriminate between citizens and aliens in public relief, he says, so also may it discriminate in public employment.

"Preferences to relieve against pauperism after it has become an accomplished fact do not violate the rights of aliens. Preferences to avoid a threatened pauperism, or to render pauperism impossible, stand on the same footing. In each instance the state announces as its public policy that the common property shall be used for the benefit of its common owners."[38]

[38]214 N. Y. 154 at p. 165.

If the right to work for the state is identical with the right to plant oysters[34] or to fish in public waters[35] or to reduce wild game to possession[36] or to receive donations of public lands or of public relief, then the discrimination against aliens in the New York statute must be regarded as justified by a long line of decisions of the Supreme Court.

There is no inexorable logic by which the similarity or dissimilarity of these various rights or privileges can be ascertained. Certain differences, however, may be observed between the right to obtain employment from the state and the right to receive the other benefits mentioned. In the one case the person gives an equivalent for what he receives; in the others, he does not. Exclusion from the opportunity to secure employment on public works has more serious practical consequences to aliens than does exclusion from the other benefits which the courts have sustained. The kind of work for which aliens are particularly adapted is becoming increasingly the work undertaken by public authorities. In view of this, the observations of Mr. Justice Hughes in *Truax* v. *Raich,* above cited, are of some significance.

"The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.

It is insisted that the act should be supported because it is not 'a total deprivation of the right of the alien to labor;' that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of 20 per cent. of his employees. But the fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective."[37]

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[34]McCready *v.* Virginia (1876) 94 U. S. 391.

[35]Commonwealth *v.* Hilton (1899) 174 Mass. 29.

[36]Patsone *v.* Pennsylvania (1914) 232 U. S. 138.

[37]36 Sup. Ct. Rep. 7, at p. 11.

Truax v. *Raich,* it is true, involved a statute compelling discrimination against aliens in private employment; but the evils which might flow from the exclusion of aliens from private employment are also in considerable measure inherent in exclusion from public employment. If, therefore, the court is not required by logic to declare that the right of aliens to work for the state stands on the same footing as the right to receive gratuities from the state, the practical results of exclusion from public employment should be given weight in deciding the question.

The objections urged in this article, however, to *Heim* v. *McCall* are not to a decision sustaining discrimination against aliens as such, but rather to the declaration of the broad principle that the state as employer may make any discrimination that it sees fit. It is submitted that the opinion of Judge Cardozo in the New York Court of Appeals presents the only legitimate ground for sustaining the New York statute under consideration. It is to be regretted that the Supreme Court announced a broader doctrine than was required by the provisions of the statute before it for consideration, when such broader doctrine seems ill-founded in logic, unwarranted by precedent, and pernicious in policy. It opens the door to the use of political power by every strong, cohesive group in the state to secure a selfish advantage at the expense of their fellow citizens. The dangers inherent in such use of political power seem to be the very ones aimed at by the provision in the federal constitution forbidding a state to "deny to any person within its jurisdiction the equal protection of the laws."

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